

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 518 (VM)

5 KUN SHAN CHUN,

6 Defendant .

7 -----x
8 New York, N.Y.
9 January 20, 2017
3:15 p.m.

10 Before:

11 HON. VICTOR MARRERO,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

18 BY: EMIL BOVE

19 ANDREA L. SURRATT

20 Assistant United States Attorney

21 FEDERAL DEFENDERS OF NEW YORK, INC.

22 Attorneys for Defendant

23 BY: JONATHAN MARVINNY

24 Also Present: Special Agent Jason Levitt, FBI,
25

1 (Case called)

2 THE COURT: This is a proceeding in the matter of the
3 United States versus Shan Chun. It's Docket 16 Cr. 518.

4 Counsel, please enter your appearances for the record.

5 MR. BOVE: Good afternoon, your Honor. Emil Bove and
6 Andrea Surratt for the government. We have here with us
7 Special Agent Jason Levitt from the FBI.

8 THE COURT: Good afternoon.

9 MR. MARVINNY: Good afternoon, your Honor. Federal
10 Defenders of New York by Jonathan Marvinny for Joe Chun.

11 THE COURT: The Court notes for the record that the
12 defendant is present in the courtroom seated next to his
13 attorney.

14 The Court scheduled this proceeding as the sentencing
15 of the defendant in this matter. I have read and reviewed the
16 presentence investigation report dated October 21, 2016 which
17 was prepared in connection with today's sentencing of Mr. Chun.
18 I have also read the submissions from the government dated
19 January 6 and January 18, 2017, and the submissions from
20 defense counsel dated January 13, 2017.

21 Mr. Bove, has the government read and reviewed the
22 presentence report?

23 MR. BOVE: Yes, your Honor.

24 THE COURT: Does the government have any objections to
25 the report to raise at this point?

1 MR. BOVE: No, your Honor.

2 THE COURT: Thank you.

3 Mr. Marvinny, have you read and reviewed the
4 presentence report?

5 MR. MARVINNY: Yes, your Honor.

6 THE COURT: Have you had an opportunity to discuss it
7 with Mr. Chun?

8 MR. MARVINNY: I have.

9 THE COURT: Do you have any objections to the report
10 to raise at this point?

11 MR. MARVINNY: No, your Honor.

12 THE COURT: Thank you. You may be seated.

13 Mr. Chun, please rise. Have you read and reviewed the
14 presentence report?

15 THE DEFENDANT: Yes, I have.

16 THE COURT: Have you discussed it with your attorney?

17 THE DEFENDANT: Yes, I have.

18 THE COURT: Thank you. You may be seated.

19 On August 1, 2016, Mr. Chun pled guilty pursuant to a
20 plea agreement before Magistrate Judge Francis to Count One of
21 Indictment 16 Cr. 0518 which charged him with acting in the
22 United States as an agent of a foreign government without prior
23 notification to the Attorney General in violation of 18 U.S.C.,
24 Section 951.

25 The Court accepted the defendant's guilty plea on

1 August 10th, 2016, having found that Mr. Chun entered the
2 guilty plea knowingly and voluntarily and that there was a
3 factual basis for the guilty plea.

4 Mr. Bove, does the government have any additional
5 comments for the Court's consideration before the Court imposes
6 sentence?

7 MR. BOVE: Your Honor, I'm going to rest principally
8 on our submissions.

9 THE COURT: All right, thank you.

10 Mr. Marvinny, do you have any additional comments for
11 the Court's consideration?

12 MR. MARVINNY: I do, your Honor. Briefly, if that's
13 okay.

14 THE COURT: Yes.

15 MR. MARVINNY: May I use the podium, your Honor?

16 THE COURT: You may.

17 MR. MARVINNY: Thank you.

18 Your Honor, I just want to begin by saying that
19 Mr. Chun feels profound remorse. That is not just something
20 that his defense lawyer is telling the Court to make Mr. Chun
21 look good, that is the truth. The remorse Mr. Chun feels is
22 real and it is deep. Nothing I said in my submission,
23 certainly nothing I say today, in any way is an attempt to say
24 that Mr. Chun is not responsible for the wrong actions he
25 committed. He committed crimes, and he's acknowledged that.

1 He continues to acknowledge that. But what we tried to do in
2 our submission is contextualize the offense, your Honor,
3 because as this Court is aware, things are never really black
4 and white, they're complicated. Mr. Chun is a human being, and
5 like all of us, similarly complicated.

6 I've offered the information about Mr. Chun's
7 motivations to provide the Court with necessary information
8 about the nature and circumstances of the offense. I'm not
9 going to belabor the points today, your Honor, I would just
10 like to say, I think the parties could probably go back and
11 forth for a long time trying to select aspects of the case that
12 support their respective arguments, but at the end of the day,
13 what we have here is an individual who provided information to
14 a government official that he never should have provided. And
15 he admits that. But he is not someone who was motivated by
16 greed, he was not someone who was out to harm the United
17 States. The truth, your Honor -- and you'll hear from
18 Mr. Chun -- is that he does love the United States. And we say
19 that, again, not to make Mr. Chun look good at sentencing, but
20 because it's the truth.

21 Your Honor, the truth is that Mr. Chun, over the
22 course of a decade of the conduct described by the government,
23 never really received any direct payments, or minimal direct
24 payments for the information he provided. He was given
25 benefits in the form of trips that were partially paid for --

1 he certainly enjoyed those trips, never said he didn't -- but
2 Mr. Chun himself never received direct payment, and that's the
3 facts of the case. And those facts cut against a suggestion
4 that he was motivated solely by greed.

5 Other actions of Mr. Chun show your Honor that he
6 wasn't motivated for that purpose. We've discussed, and the
7 government has discussed, how Mr. Chun at one point passed an
8 organizational chart about the FBI office. And as the
9 government agrees, in that instance Mr. Chun took that
10 organizational report, copied it by hand, and deleted the names
11 of the FBI personnel from that report before sending it over to
12 the government official. That's not the behavior of someone
13 hellbent on harming the United States. That's not the behavior
14 of someone solely motivated by greed. Mr. Chun's actions
15 there, and in other instances, support our position that
16 Mr. Chun was primarily motivated by a desire, however
17 misguided, to help his parents. That was the motivating
18 factor.

19 Your Honor, there's some discussion of the undercover
20 agent that was sent to essentially incriminate Mr. Chun into
21 more serious offenses. Your Honor, there's a 600-page
22 transcript of the conversations between that undercover and
23 Mr. Chun. And again, the government can and has selected
24 portions of that transcript to try to make Mr. Chun look worse.
25 The defense can also select portions of that transcript, as we

1 have, to show that there was much more going on in Mr. Chun's
2 mind than greed and a desire to hurt the United States. But
3 again, Mr. Chun's actions really tell the story. At the end of
4 that nearly year-long effort to entice Mr. Chun to commit more
5 serious offenses, he didn't do it. He simply did not do it.
6 There was no additional charge that came out of that nearly
7 year-long effort to get Mr. Chun to commit more serious
8 offenses. That again, your Honor, supports the rationale and
9 the explanation that we've provided for how Mr. Chun finds
10 himself in this position.

11 Your Honor, I'll wrap up by saying, you know, we
12 talked about what we believe are the most pertinent 3553(a)
13 sentencing factors in our submission. I tried to talk about
14 the nature and circumstances of the offense, talk about how
15 they are mitigating.

16 I'll say, as for specific deterrence, your Honor, I
17 respectfully submit this is not even a close call. Mr. Chun is
18 wholly deterred. He is remorseful, as I said earlier. He has
19 sought to make progress since he's been arrested. He has
20 sought to do everything that could be asked of someone in his
21 position. He is simply no threat whatsoever to ever commit
22 another offense.

23 The government has focused on general deterrence, but
24 as I said in my submission, your Honor, Mr. Chun, he's a
25 singular human being being sentenced for his specific conduct.

1 He's not an example, he's not a sacrificial lamb, he is someone
2 whose sentence should be proportional to the things he did and
3 the person he is.

4 But on that score, your Honor, Mr. Chun has already
5 been very seriously punished for his wrongdoings. He has, of
6 course, lost his job with the FBI, he has been publicly shamed
7 via the media attention in this case, he's a convicted felon,
8 that felony will stay on his record and with him for the rest
9 of his life. Those are serious, serious punishments that this
10 Court should consider, punishments that have already been
11 exacted upon Mr. Chun. I think it's fair to say the public
12 well understands that his conduct was serious and they've
13 gotten the message, so the Court need not make an example of
14 him here today to develop that message.

15 Your Honor, given Mr. Chun's history and
16 characteristics, the very first offense, he's someone who's got
17 an impressive and admirable back story. I've tried to provide
18 some detail about that in my submission. All the factors
19 together show that prison simply isn't necessary here, your
20 Honor. We've asked you to impose three years of supervised
21 release with one year of home confinement. That is a
22 significant penalty that has teeth. It accounts for the
23 seriousness of what Mr. Chun did, but it also accounts for the
24 other mitigating factors in this case and the other 3553(a)
25 factors.

1 So, your Honor, unless you have specific questions for
2 me, I'm happy to sit down at this point.

3 THE COURT: Thank you.

4 MR. MARVINNY: Thank you, your Honor.

5 THE COURT: Mr. Chun, please rise. Is there anything
6 you would like to say on your own behalf before the Court
7 imposes sentence?

8 THE DEFENDANT: Your Honor, there's no word that I can
9 say for the wrong things that I have done. I'm sorry. I'm
10 sorry. I'm sorry to the FBI. I'm sorry. I take full
11 responsibility for what I have done or the wrong things I have
12 actually done. I'm sorry. Your Honor, thank you for the time.

13 THE COURT: Thank you.

14 In accordance with the decision by the United States
15 Supreme Court in United States versus Booker, while the United
16 States Sentencing Guidelines are not mandatory, the Court
17 nonetheless must consult those guidelines and take them into
18 account at sentencing. Therefore, the Court has considered the
19 findings of fact stated in the presentence report, as well as
20 the guidelines analysis and the recommendations contained
21 therein. The Court has weighed this information along with the
22 factors listed in 18 U.S.C., Section 3553(a) in coming to its
23 final sentencing decision in this case.

24 The Court adopts the factual recitation in the
25 presentence investigation report regarding the criminal history

1 category and offense level but defers to the plea agreement for
2 the applicable guidelines sentencing range. Therefore, the
3 Court finds that under the guidelines, Mr. Chun does not have
4 an applicable offense level and his criminal history falls into
5 Category I. The guidelines range of imprisonment is 21 to 27
6 months' imprisonment.

7 Mr. Chun pled guilty to acting in the United States as
8 an agent of a foreign government without prior notification to
9 the Attorney General. The probation office has recommended
10 that the Court impose a sentence of 21 months' imprisonment.
11 The government has also requested that the Court impose a fine
12 of \$95,000. Subsection (a)(1) of 18 U.S.C., Section 3553
13 requires that the courts take into consideration the nature and
14 circumstances of the offense and history and characteristics of
15 the defendant. Subsection (a)(2) of 18 U.S.C., Section 3553
16 requires that the Court consider the need for the sentence to
17 promote certain objectives of the criminal justice system,
18 namely, punishment, specific and general deterrence, and
19 rehabilitation. Pursuant to Section 3553(a)(6), the Court is
20 also directed to consider the need to avoid unwarranted
21 sentencing disparities among defendants with similar records
22 and similar offenses in other cases, as well as in connection
23 with the case at hand.

24 The sharply contrasting portrait of Mr. Chun that the
25 parties have presented to this Court in their sentencing

1 submissions and at the hearing call to mind the long-running
2 television game show "To Tell the Truth". In that program, the
3 real person and two imposters appear at the studio in disguise.
4 A distinguished panel then questions the contestants about who
5 they are to determine which of them is telling the truth and,
6 thus, is the real person. At the end of the questioning, the
7 show host asks, "Will the real -- person's name -- please stand
8 up."

9 This proceeding poses that question. It asks the
10 Court to identify which is the real Kun Shan Chun and impose a
11 sentence on that person. So is there a real Mr. Chun here as
12 well as an imposter? Regrettably, the fact is that there is
13 but one Mr. Chun before the Court, the individual who embodied
14 the Mr. Chun he later became and who got into the trouble that
15 brought him here today. It is the later characteristics of
16 that person on whom the Court calls attention at this time.
17 This focus is warranted because during the past ten years, this
18 part of Mr. Chun's life has played the dominant self of his
19 being and personality.

20 In making this assessment, the Court has taken into
21 account several extremely serious aggravated considerations.
22 First, the circumstances presented here do not entail an
23 aberration, a one-time deviation from the defendant's otherwise
24 straight and continuous behavioral pathway, nor was Mr. Chun's
25 offense a reckless departure of an immature youth. Mr. Chun,

1 now 46, set out on the criminal course that landed him here
2 today ten years ago, presumably at the prime of his
3 intellectual capacity and maturity.

4 Moreover, the Court is not persuaded to the
5 fact-supported reading that at the time Mr. Chun commenced his
6 criminal career, he was under severe economic or personal
7 hardship that emotionally may have served as a form of coercive
8 force explaining his or mitigating his wrongdoing. What comes
9 across from the records strongly suggests otherwise. At all
10 times during the past ten years, Mr. Chun knew what he was
11 doing and that it was very wrong, but he did it, nonetheless,
12 and in a way that suggests not only his full awareness but
13 calculated efforts to conceal his criminal actions.

14 Second, Mr. Chun was employed by the FBI during the
15 time of his crimes. In this employment context, protecting
16 confidence requires the utmost loyalty and integrity. For a
17 law enforcement agency such as the FBI, a betrayal of the vital
18 code of trust and confidence perhaps ranks as the occupational
19 equivalent of a most serious treachery.

20 Third, Mr. Chun's conduct entailed not only a betrayal
21 of his oath on duty, of loyalty and confidence in handling
22 sensitive material, but doing so in concert and at the behest
23 of an official of a foreign government.

24 Fourth, the foreign agent at the other end of
25 Mr. Chun's betrayal was a government official, not of the Duchy

1 of Grand Fenwick, but of China, a country which Mr. Chun knows,
2 or should have known, occupies a unique position among world
3 nations, possessing the means and resources, as well as the
4 competitive pressures to threaten the interests and the
5 national interests of the United States.

6 Cumulatively, these considerations weigh heavily in
7 determining an appropriate sentence that unequivocally
8 expresses the seriousness of Mr. Chun's crimes, not only as
9 notice to him but to the rest of the world.

10 Accordingly, while the Court has closely taken into
11 account Mr. Chun's entire personal history and characteristics,
12 full as they are with episodes of commendable and exemplary
13 behavior and sympathetic mitigating circumstances, unbalanced,
14 the Court is not persuaded that a probationary sentence
15 Mr. Chun urges would be appropriate and sufficient, and in fact
16 would properly reflect the objectives of sentencing in this
17 case.

18 Mr. Chun, please rise.

19 Taking into account the nature and circumstances of
20 the offense and the history and characteristics of the
21 defendant and considering all of the factors listed in 18
22 U.S.C., Section 3553(a), the Court finds that a sentence of 24
23 months' imprisonment is appropriate, and that such a term is
24 sufficient but not greater than necessary to promote the proper
25 objectives of sentencing. Upon your release from imprisonment,

1 you shall be placed on supervised release for a term of one
2 year. The Court will also impose a fine of \$10,000, which
3 shall be paid commencing upon your release from imprisonment in
4 equal monthly installments during the time of five years.
5 You're also ordered to pay to the United States a special
6 assessment of \$100, which shall be due immediately.

7 Mr. Bove, is there a forfeiture in this case?

8 MR. BOVE: No, your Honor.

9 THE COURT: Mr. Chun, you must comply with the
10 standard conditions 1 through 13 of supervised release and the
11 following mandatory conditions:

12 You shall not commit another federal, state, or local
13 crime. You shall not legally possess a controlled substance.
14 You shall not possess a firearm or destructive device. The
15 mandatory drug testing condition is suspended based on the
16 Court's determination that you pose a low risk the future
17 substance abuse, and you shall cooperate in the collection of
18 DNA as directed by the probation officer.

19 In addition, you shall obey the following special
20 conditions:

21 You shall provide the probation officer with access to
22 any and all requested financial information. You shall submit
23 your person, residence, place of business, vehicle, and any
24 other property or electronic devices under your control to
25 search on the basis that the probation officer has reasonable

1 suspicion that contraband or evidence of a violation of the
2 conditions of release may be found. The search must be
3 conducted at a reasonable time and in a reasonable manner.
4 Failure to submit to search may be grounds for revocation. You
5 shall inform any other residents that the premises may be
6 subject to search pursuant to this condition.

7 Mr. Chun, do you understand each of these conditions?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: You shall report to the nearest probation
10 office within 72 hours of release. The Court recommends that
11 you be supervised by the district of residence. The sentence
12 as stated is imposed.

13 Mr. Chun, to the extent that you have a right to
14 appeal your sentence and you're unable to pay the costs of an
15 appeal, you have the right to apply for leave to appeal in
16 forma pauperis, meaning as a poor person. If you make such a
17 request, the clerk of court must immediately prepare and file
18 an order of appeal on your behalf.

19 Do you understand your right to appeal, to the extent
20 that it may exist?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Mr. Bove, are there any remaining counts
23 or underlying indictments that need to be dismissed at this
24 time?

25 MR. BOVE: No, your Honor.

1 THE COURT: Mr. Marvinny, do you have a proposal with
2 regards Mr. Chun's surrender?

3 MR. MARVINNY: Yes, your Honor. We would respectfully
4 request that your Honor fix a date two months from today so
5 that Mr. Chun might voluntarily surrender.

6 THE COURT: Mr. Bove, does the government have any
7 view on that?

8 MR. BOVE: Your Honor, I don't object to the request
9 for 60 days for the surrender, but I do have an application to
10 modify the terms of the defendant's release pending that
11 surrender in light of the changed circumstances arising from
12 today's sentence, as well as the defendant's substantial
13 connections in China, and in addition, his statement to the
14 undercover employee in July of 2015 that the Chinese government
15 would be willing to provide immigration benefits to people who
16 assist them.

17 In light of all those considerations, we would ask
18 that the terms of his release be modified to reinstate the
19 condition of home incarceration pending his surrender in 60
20 days.

21 THE COURT: Mr. Marvinny.

22 MR. MARVINNY: One moment, please, your Honor. Your
23 Honor, I don't think that change is necessary. Mr. Chun is
24 still currently on electronic monitoring. He has been since
25 the inception of this case. He, I think, is just on a

1 condition of home confinement, which is just a slightly lower
2 restriction that allows him to work. He has a curfew right
3 now, your Honor, that's been in place. He's been fully
4 compliant, so he's been very closely monitored. I'd just like
5 him to have the opportunity to continue, for the remaining two
6 months he has, to be able to earn a little bit of money to help
7 provide for his family, to help start paying the fine.

8 He's been fully compliant, and your Honor, quite
9 frankly, Mr. Chun and I have had many discussions about the
10 possibility of incarceration here, and Mr. Chun was prepared
11 for it, has accepted it, and is not a flight risk in the least,
12 your Honor. He's really not.

13 THE COURT: All right, thank you.

14 In light of the fact that Mr. Chun is already subject
15 to monitoring and home detention, I will deny the request for
16 any further changes. I will direct, however, that the
17 probation office continue strict supervision of Mr. Chun.

18 Let's look for a date 60 days out for self-surrender.

19 THE DEPUTY CLERK: How about Monday, March 20th?

20 MR. MARVINNY: That's fine. Thank you.

21 THE COURT: Mr. Chun, you are directed to surrender to
22 the facility designated by the United States Bureau of Prisons
23 by noon on March 20 of 2017. If no facility has been
24 designated by that date, you are directed to surrender to the
25 United States Marshal for this district.

1 Do you understand that your failure to do so may
2 subject you to prosecution for an offense separate and apart
3 from that which you've been sentenced here today?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: All right, thank you.

6 If there's nothing else, I thank you, and have a
7 good day and a good weekend.

8 MR. BOVE: Thank you, your Honor.

9 (Adjourned)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25